In the Supreme Court of the United States

OCTOBER TERM, 1959.

No. 36.

CARL C. INMAN,

Petitioner,

vs.

THE BALTIMORE & OHIO RAILROAD COMPANY,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO.

PETITIONER'S REPLY BRIEF.

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TABLE OF CONTENTS.

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Respondent makes a new contention in its brief, and now argues to this Court that there was but one intersection of Tallmadge Avenue and Home Avenue (Respondent's brief, page 4); and states that Petitioner was standing near the center line of Tallmadge Avenue about 40 feet west of the westerly limit of the intersection when hit (Respondent's brief, page 6). This is not the fact. By reason of the angle of the railroad tracks across the intersection, there are two separate intersections of Home Avenue into Tallmadge Avenue. One intersection of the highways is located east of the tracks and the other intersection is located west of the tracks. (Joint Ex. A; R. 234; See also Petitioner's Exhibits 5, 7 and 11, R. 214-216.)

The opinion of the Court of Appeals says that Petitioner was struck by an automobile "being driven in a

northeasterly direction on Home Avenue and making a left turn into Tallmadge Avenue at said *intersection*." (R. 249.)

It is respectfully submitted that from the clear import of this language of the Court of Appeals and from the facts of record, respondent's new position that Home Avenue does not also intersect Tallmadge Avenue west of the railroad tracks and that petitioner, when struck, was standing 40 feet west of the westerly limit of the intersection is patently erroneous. However, in view of the most unusual character of the multiple street intersections at this crossing the confusion is understandable.

We are unable to understand clearly the position of respondent, for it seems to take contrary positions on this question. When it suits its purpose it contends petitioner was struck at the intersection of Home Avenue and Tallmadge. (See Respondent's written requests to charge before argument Nos. 5 and 8, R. 192-193.)

Respondent further claims "There was not a syllable of evidence offered into the record which would even suggest that any motorist proceeding north on Home Avenue, other than the driver, James Ball, had ever made such a left turn in that area" (Respondent's brief, page 10).

Witness Sam Bailey testified positively that he not only saw the automobile strike Mr. Inman but also that he had seen other cars make just such a left turn at that same intersection on a lot of other occasions and his testimony on this subject may be found (R. 68) and in petitioner's brief on the merits at page 6.

We submit that the testimony of Sam Bailey completely destroys the railroads' claim of lack of evidence on this subject.

The Duties Petitioner Was Required to Perform and the Circumstances Under Which He Was Required to Work Made Injury to Him Almost a Certainty. At Least, Such an Eventuality Was Clearly Foreseeable.

Certainly there is no merit in respondent's claim that petitioner did not testify that he had any duty other than to warn highway traffic of approaching trains. During the time when the train was occupying the crossing which was 5 to 10 minutes (R. 98), Mr. Inman testified that he had received a report that the Detroit Steel train was due out of Ravenna and that *it was his duty* to look to the north for that train before he could clear the crossing to let traffic through. His testimony follows (R. 17):

"Q. Which way did you face then after the train started to pull across the crossing?

A. After the crossing was blocked you have reference to?

Q. Yes.

A. I looked at the train, I looked anyway, that time, until I could see where the caboose was, *then I had to look north towards Cuyahoga Falls* to see if I could get a reflection, that was looking over my left shoulder.

Q. What was your reason for looking toward Cuyahoga Falls?

A. One to see if there was a reflection of a headlight coming around the curve. I couldn't see the light down at Evans Avenue.

Q. Why couldn't you?

A. The eastbound train was blocking it."

And see also the testimony of Elmer Fox, signal maintainer for respondent, with reference to the duties of petitioner (R. 126):

"Q. Is that his duty to see if there's a train approaching from the other way?

A. Yes, sir.

Q. He's at a more advantageous spot if he goes to the west side of the track?

A. That's right.

Q. That way he can look to the left or north or look to the south at that light when the train had passed a certain point where he could see it?

A. Yes.

Q. And it is his duty, until the train which is going east passes the crossing, to stay there to see if there's another train coming that comes into the circuit?

A. Yes."

The fact that respondent ignores this testimony only makes it stand out in bold relief.

Respondent's contention that there was no evidence upon which this case could properly be submitted to a jury ignores the evidence in the record. The railroad crossing involved in this case possessed features of peculiar and unusual hazard. This was an ultimate fact well established by the record. Standing in the center of a busy highway, entails some risk to a person, but standing in the intersection of two busy highways, in the night season, and in such a position that the person is unable to face traffic entails *a greater risk*.

The only reason respondent did not foresee or anticipate the likelihood of petitioner's injury is that it failed to give any consideration to petitioner's safety. Had the respondent given any thought to the matter,

(1) It would not have required *one* flagman to flag traffic in all directions at this particular crossing and then

(2) have him stand directly within the intersection of two busy highways, for a period of 5 to 10 minutes, in the night season, and require him to

look for other trains approaching the crossing and to watch for "hot boxes" on the train moving over the crossing with his back to traffic.

(3) It would have permitted him to face traffic to contend with the dangers to which he was exposed.

The Issue of Ball's Negligence.

Respondent expends several pages of its brief on the negligence of Ball and devotes about the same space to the traffic laws governing motorists in the operation of motor vehicles. We deal with this issue because we believe it is a false issue, not properly a part of this case, which needlessly confuses and obscures the real issue between petitioner and the respondent railroad. The Court is not here concerned with a criminal prosecution against Ball for violation of the traffic law. This is simply a negligence case against the railroad.

In *Lillie v. Thompson*, 332 U. S. 459, the Court said at page 462:

"That the foreseeable danger was from intentional or criminal misconduct is irrelevant."

This Court in *Rogers v. Missouri Pacific R. Co.*, 352 U. S. 500 (1957) said at pages 506, 507:

"Judicial appraisal of the proofs to determine whether a jury question is presented is narrowly limited to the *single inquiry* whether, with reason, the conclusion may be drawn that negligence of the *employer* played any part at all in the injury or death." * * *

"It does not matter that, from the evidence, the jury may also with reason, on grounds of probability, *attribute the result to other causes*."

Under the Court's charge (R. 203-5), the jury verdict is a finding that the respondent could have anticipated or

foreseen that petitioner would be injured by just such an occurrence. We still practice law under a jury system. It was not for defense counsel or the Court of Appeals to say that respondent could *not* foresee or anticipate the manner in which petitioner was injured *as a matter of law*.

Assuming all respondent says about Ball is true, the jury, nevertheless, found that respondent was negligent.

In answer to respondents' claim that there was no proof of similar occurrences resulting in injury to any other watchman at this crossing we cite the case of *Arnold v. Panhandle and Santa Fe Ry.*, 77 S. Ct. 840 (1957), reversing 283 S. W. 2d 303 (Tex. Civ. App. 1955). Here the railroads car inspector was working in a ten foot passageway adjoining the tracks where he was injured by a third party's truck which backed into him. There was a verdict for petitioner which was reversed by the Texas Court of Civil Appeals. *There was no evidence of any prior similar occurrence.* The Supreme Court in reversing pointed out that there was testimony justifying the inference that the passageway as used was not a safe place to work.

In the case of *Cornec et al. v. Baltimore & Ohio R. Co.*, 48 F. (2d) 497 the Court said at page 501:

> "Negligent methods of operation do not always or even generally result in disaster. The inquiry is, not whether a method of operation has been used without disastrous results, but whether it is of such a character that danger of injury is reasonably to be apprehended from its use. Where the element of danger is present, successful operation is to be deemed 'fortunate rather than prudent.'"

CONCLUSION.

For the reasons given in petitioner's brief and in this reply brief, petitioner again respectfully submits that the judgment of the Court of Appeals for Summit County, Ohio, should be reversed with directions that the judgments of the trial court be affirmed.

Respectfully submitted.

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